No. 94-1837

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,
Petitioner,

v.

BILL NELSON, INSURANCE COMMISSIONER
OF THE STATE OF FLORIDA,
FLORIDA DEPARTMENT OF INSURANCE,
FLORIDA ASSOCIATION OF LIFE UNDERWRITERS,
PROFESSIONAL INSURANCE AGENTS OF FLORIDA, INC.,
AND FLORIDA ASSOCIATION OF INSURANCE AGENTS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE PETITIONER

NATHAN LEWIN
(Counsel of Record)
SCOTT L. NELSON
J. BRADLEY BENNETT
JAMES R. HEAVNER, JR.
MILLER, CASSIDY,
LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400
Attorneys for Petitioner

RICHARD E. SWARTLEY
General Counsel
BARNETT BANKS, INC.
50 N. Laura Street
Jacksonville, FL 32202
(904) 791-7505

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QUESTIONS PRESENTED

1. Whether a federal statute that gives a national bank operating in a town with a population not exceeding 5,000 the right to sell insurance (12 U.S.C. § 92) preempts a state law that prohibits such a bank from selling insurance.

2. Whether a state law prohibiting banks from selling insurance is a law enacted "for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

3. Whether 12 U.S.C. § 92 is an "Act [that] specifically relates to the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

LIST OF PARTIES

The caption of this case reflects the substitution of Bill Nelson, current Insurance Commissioner for the State of Florida, for his predecessor, Tom Gallagher. Otherwise, the names of all parties to the proceeding below appear in the caption of this case.

A list of parent companies and wholly owned subsidiaries of the petitioner Barnett Bank of Marion County, N.A., is provided in the petition for writ of certiorari at page ii.

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immunity under the second clause of McCarran-Ferguson is necessary if the first clause is to offer protection to most insurance consumer protection laws.

The *National Securities* test, which looks to the insurer-policyholder relationship, contemplates a "public action" perspective whereby states enact laws to adjust, manage or control this relationship. On the other hand, the *Pireno* test, by looking to: (1) whether the practice has the effect of transferring or spreading a policyholder's risk; (2) whether the practice is an integral part of the policy relationship between the insurer and insured; and (3) whether the practice is limited to entities within the insurance industry; contemplates a "private action" perspective whereby an insurer's practices are examined to determine if antitrust immunity applies to that action.

The "business of insurance" under the *Pireno* test, focusing on an insurer's practices to determine if that insurer is acting within the confines of the antitrust immunity granted by the second clause of McCarran-Ferguson, does not contemplate the broader context of regulation of the elements of the business of insurance.

Therefore, the proper inquiry is whether Section 626.988, under the holdings of *National Securities* and *Fabe*, is a law enacted "for the purpose of regulating the business of insurance" by regulating the insurer-policyholder relationship. Even if *Pireno* were applicable, Section 626.988 satisfies that test because it is critical to the relationship between the insurer and insured.

The practical effect of the McCarran-Ferguson Act is that each state can enact laws to regulate the business of insurance in keeping with the particular needs and conditions in that state. The result is a diverse set of insurance regulatory schemes (with many similarities) reflecting the perspective of each individual state. One of the strengths of state regulation of the business of insurance is that a state's regulatory regime can be focused on

the unique circumstances of that particular state. In this regard, it is important to keep in mind that Florida's insurance regulatory laws were enacted to apply to Florida's (and only Florida's) insurance environment. The context within which to view the Florida Legislature's aim in enacting 626.988 is Florida's unique demographic composition. Florida's large population of senior citizens and newcomers to the state (from other states and other countries) are especially vulnerable to coercion or unfair trade practices.

B. Section 626.988 is Part Of A Comprehensive Legislative Scheme That Protects Policyholders And Was Enacted For The Purpose Of Regulating The Business Of Insurance.

Appellants characterize Section 626.988, Florida Statutes, as a "bare pin-pointed prohibition, not part of a scheme of regulation." (Barnett Br. p. 13) Nothing could be further from the truth. Section 626.988 is an important element of a comprehensive regulatory scheme (the Florida Insurance Code) enacted for the purpose of protecting the Florida insurance-buying public. Section 626.988 is contained in Florida's Insurance Code in Part X of Chapter 626, Florida Statutes. Part X is entitled the "Unfair Insurance Trade Practices Act" and was enacted to implement the legislative intent of Congress in passing the McCarran-Ferguson Act.

The practices prohibited in Part X of Chapter 626 are those unfair and deceptive acts which occur during the solicitation, negotiation, effectuation, and servicing of insurance contracts. Thus, the provisions of Part X (of which 626.988 is a part), necessarily regulate the relationship between insurance companies and current and prospective policyholders in order to prevent unfair methods of competition, and unfair or deceptive acts or practices. The regulated activities extend to agents, insurers, and all other persons involved in the relationship between the

insurance company and the policyholder. *See, e.g.*, Fla. Stat. Ann. § 626.9511(1).

In Florida, soliciting, negotiating, effectuating, and servicing of insurance policies for current or prospective policyholders must be accomplished through agents licensed by the Department. For example, Section 626.041, Florida Statutes, requires that only licensed agents may: solicit insurance or procure applications, receive insurance premiums on behalf of an insurer, deliver any insurance contract or any renewal thereof, analyze insurance policies or give opinions with respect thereto, or in any way cause to be effected any insurance contract. Similarly, Section 624.425, Florida Statutes, requires that an insurance policy may be issued only through a licensed agent.

Because an insurance company can only act through agents licensed by the State of Florida to solicit and service insurance policies, laws which govern agent activities and proscribe various unfair and deceptive trade practices in connection with the solicitation, negotiation, and effectuation of the insurance contract are laws enacted for the purpose of regulating the business of insurance. By regulating the relationship between the insurance company and policyholders carried out through insurance agents, Florida has enacted statutes which fall within the class of statutes described in *Nat'l Securities*, and *Fabe*. The question then becomes whether 626.988 was enacted to be part of this system.

C. It Has Been Well Established That 626.988 Was Enacted To Avoid Unfair Trade Practices, Coercion, And Undue Concentration Of Resources.

The need to ascertain the aim of the Legislature in enacting a particular law for McCarran-Ferguson analysis requires what is essentially a "state-by-state" and "case-by-case" process. Barnett, in its brief at page 11, refers to the decision of the Sixth Circuit in *Owensboro National Bank v. Stephens*, 44 F.3d 388

(6th Cir. 1994), as a "contrary decision" which was "ignored" by the Eleventh Circuit. However, the holding in *Owensboro* in no way controls the result in the instant case, as the 11th Circuit properly found. Barnett fails to recognize that the *Owensboro* case dealt with a different Kentucky law, with the particular aims of the Kentucky legislature in enacting it, and with an entirely different history of construction and application than Florida's Section 626.988. *Owensboro* was decided by the Sixth Circuit based upon that Court's conclusion that Kentucky law Section 287 was not enacted for the purpose of regulating the business of insurance. The Sixth Circuit did not consider the issue of whether Section 92 of the National Bank Act "specifically relates to the business of insurance" for McCarran-Ferguson purposes. Thus, the Sixth Circuit *Owensboro* decision is plain and simply a decision which turned on the merits of Kentucky law Section 287.

Ascertaining the aim of the Florida Legislature in enacting 626.988 is aided by the considerable amount of scrutiny this law has received over the years. The Court of Appeals began its analysis of the aim of 626.988 with the location of the law in the Florida Insurance Code. Section 626.988 is located in the part of the Florida Insurance Code entitled "Unfair Insurance Trade Practices." As expressed in *Fabe*, location informs (but does not determine) as to whether a statute regulates the business of insurance. The expressed purpose of the statutory provisions within the Unfair Trade Practices Act is found at Section 626.951, Florida Statutes:

> The purpose of this part is to regulate trade practices relating to the business of insurance in accordance with the intent of Congress of March 9, 1945 (Pub. L. No. 15, 79th Congress) [the McCarran-Ferguson Act], by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive

> acts or practices and by prohibiting the trade practices so defined or determined.

Id. Placing Section 626.988 within the Unfair Trade Practices Act suggests that the Legislature's aim in enacting this provision was to prohibit unfair methods of competition or unfair or deceptive acts or practices relating to the business of insurance.

The next source of information on the Legislature's aim in enacting 626.988 is the preamble (amended out prior to passage) to the bills leading to the enactment of 626.988, extensively referred to in Barnett's brief.[2]

The preamble cites a series of findings by a federal administrative law judge in a recommended decision for consideration by the Federal Reserve Board regarding bank holding companies' applications to the Federal Reserve Board to engage in insurance agency activities. The actual preamble provisions found at Barnett's Brief Appendix pages 5a-7a are much more instructive than Barnett's paraphrase at page 19 of its Brief. In particular, finding (d) of the administrative law judge cited in the preamble found:

> ...[w]hile it is difficult to accurately measure the psychology of voluntary tieing, nevertheless the weight of evidence realistically evaluated suggests that in times of scarcity of lending funds, the average borrower finds himself in a weakened bargaining position vis-a-vis the lender and the offer of insurance placement is another device along with compensating balances and utilization of other borrowing services with which the borrower can increase the probability that a needed loan will be granted.

Barnett Br. App. 6a-7a.

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[2] The preamble was not introduced into evidence at trial.

The preamble describes the findings as based upon "an exhaustive presentation of evidence." The text of the preamble shows that the preamble drafters were incredulous that despite finding (d), and the other cited findings, the administrative law judge nonetheless recommended that the bank applicants be authorized to engage in insurance agency activities in a limited manner and subject to various restrictions. The preamble drafters then proceeded to express their concerns over insurance agents being employed by, associated, or affiliated with bank holding companies by stating:

> WHEREAS, the undue concentration of economic resources, a substantial decrease in competition among insurance agents, unfair competition, conflicts of interest, and voluntary tieing are against the public policy of the state and against the best interests of the people of Florida, and
>
> * * *
>
> WHEREAS, to preserve the public policy and protect the public interest insurance agents and solicitors should be prohibited from soliciting, negotiating and selling insurance contracts if employed by, associated or affiliated in any way with specified institutions.

Barnett Br. App. 7a.

It is noteworthy that 626.988 is characterized in the preamble as a prohibition against insurance solicitors and agents soliciting, negotiating, and selling insurance contracts in the employ of or association with financial institutions. This perspective shows the legislative aim was to protect the public interest with regard to an essential element of the insurance transaction — the point of sale by an insurance agent. Thus, the preamble provisions are entirely consistent with the Legislature's placement of 626.988 within the Unfair Trade Practices Act.

Barnett's assertion that the legislature's primary purpose in enacting Section 626.988 was to protect insurance agents is not supported by a fair reading of the preamble or any evidence presented in this case.

Another source of insight regarding the rationale for 626.988 is state litigation involving this law, particularly *Glendale Federal S&L v. Department of Insurance*, 587 So.2d 534 (Fla. lst DCA 1991), cited by the Court of Appeals below. The Florida trial court's summary judgment order in *Glendale* noted that the parties had developed a factual record through the filing of memoranda and through extensive discovery. Based on the evidence presented, the trial court found:

> *Concerns* regarding financial institutions' entry into insurance activities, including the prevention of coercion, unfair trade practices, and undue concentration of resources, existed at the time of passage of the *statute and remain valid today.* Expert testimony filed with this Court shows that a legislature could well have decided that some protection was required.

Glendale, 587 So.2d at 536, n.1. (emphasis added).

The language used by the District Court of Appeal reflects the Court's conclusion, based on the evidence presented, that the perceived dangers were real and far from "implausible." The District Court of Appeal, in affirming the trial court, held:

> [T]he cited rational bases of prevention of coercion, unfair trade practices and undue concentration of resources, in light of evidence in the form of affidavits and deposition testimony of expert witnesses, support the conclusions that the legislature could properly decide to act as it did, and that the statute accordingly does not violate due process.

587 So.2d at 537.

The District Court below also noted this fact in an earlier decision, *Production Credit Associations of Florida v. Department of Insurance*, 356 So.2d 31 (Fla. 1st DCA 1978). In construing whether certain entities were "financial institutions" under 626.988, the Florida appellate court held:

> Insurance is an industry affected with a public interest and subject to regulation by the States. The Legislature has determined that there is a potential for abuse inherent in financial institutions being involved in the sale of insurance, and that the licensing of employees of financial institutions as insurance agents is not in the public interest.

Id. at 32. The Florida First District Court of Appeal in *Production Credit* clearly understood the legislative purpose of 626.988 to be protecting the public from abuse.

When the issue of financial institutions engaging in insurance agency activities has been subjected to extensive evidentiary exposition, both in *Glendale* and the administrative hearing cited in the preamble, the finding has been that unfair trade practices, coercion, undue concentration of resources, and conflict of interest may arise from this practice.

In another case involving implementation of 626.988, *Great Northern Insured Annuity Corporation, et. al v. Department of Insurance and Treasurer*, a state of Florida Division of Administrative Hearings Final Order (*Fl. Bankers Assoc.* Br. 1a-37a), independent Hearing Officer Mary Clark found, also after hearing extensive evidence:

> As stated in *Glendale*, the legislature was guarding against the dangers of financial institutions becoming involved in the business of insurance: the prevention of coercion, unfair trade practices, and undue concentration of resources.

Fl. Bankers Assoc. Br. p. 22a.

As can be seen, for purposes of determining Legislative intent, Section 626.988 comes before this Court as the most battle-hardened state law in the nation involving the issue of insurance agents associating with financial institutions in the sale of insurance. Each time, however, the ultimate finding has been that 626.988 was enacted to prevent coercion, unfair trade practices, and undue concentration of resources.

Barnett disingenuously argues that Ms. Linda Clifford, as a licensed insurance agent, was as personally qualified to sell insurance after she became a Barnett Bank employee as she had been previously. This argument avoids the real issue. When Barnett purchased Ms. Clifford's insurance agency and she became a Barnett employee, it was the influence exerted on insurance transactions by Barnett and not by Ms. Clifford personally, which gave rise to the Department's Immediate Final Order. The record is clear that the direction and mission of the Linda Clifford Insurance Agency changed dramatically upon purchase by Barnett.

Barnett and its Amici further urge this Court to dismiss as implausible the expressions of legislative purpose of 626.988 made by Florida's Legislature, insurance regulator, and courts. The crux of their argument is that no one could really believe that prohibiting bank holding companies from engaging in insurance agency activities safeguards insurer solvency and protects the public in insurance transactions. Barnett and its Amici base their entire reasoning on the premise that 626.988 is solely an economic conflict between banks and independent insurance agents and is not "truly regulatory". If 626.988 has a greater public protection purpose and is "truly regulatory," Barnett's arguments collapse.

Actual experience in Florida has demonstrated that unfair trade practices do occur when bank holding companies enter into arrangements with insurance agents for the sale of insurance on bank premises.

In the case of *Department of Insurance and Treasurer v. James Mitchell and Company, et al.* (Recommended Order dated August 30, 1994), State of Florida Division of Administrative Hearings Independent Hearing Officer Charles C. Adams[3] made the following Finding of Fact at page 6, paragraph 12:

> As contemplated by the services agreement the customer base for the James Mitchell insurance agents is primarily constituted of Barnett Bank customers who have been referred by Barnett Bank employees. The insurance agents and other employees who work in Florida do not solicit insurance business unrelated to the tie-in with Barnett Banks, Inc. and its branches.

The Hearing Officer made a Conclusion of Law at page 46, paragraph 121, of his Recommended Order, that the arrangement between James Mitchell and Company and Barnett had the following result:

> James Mitchell and Company has violated Section 626.9541(1)(b), Florida Statutes, in the manner alleged. Specifically, James Mitchell and Company has knowingly established its own advertising, and benefited from Barnett advertising pursuant to the services agreement. James Mitchell and Company has made statements about, and benefited from statements by Barnett employees pursuant to the services agreement. The advertising and statements concerned insurance sales through the Tax Advantage Account by Mitchell Tax Advantage Account Specialists (insur-

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[3] The administrative proceedings in *James Mitchell* (as well as in *Great Northern, supra.*), were pursuant to Florida's Administrative Procedures Act, Chapter 120, Florida Statutes, and as such the hearing officers in both proceedings were independent of, and not chosen by the Department.

ance agents). By these arrangements, James Mitchell and Company has placed before the consuming public information which is deceptive and misleading as to the fact that insurance products are being sold by insurance agents who work for James Mitchell and Company. James Mitchell and Company has committed the violations both by direct and indirect actions. Violations of Section 626.9541(1)(b), Florida Statutes, pertaining to the deceptive and misleading actions by James Mitchell and Company are found in the use of business cards which the James Mitchell and Company insurance agents provide to customers, appointment cards prepared by Barnett employees, and brochures disseminated by Barnett employees and Mitchell employees, which materials contribute to the deceptive and misleading nature of the Mitchell/Barnett program. The office layout in which the James Mitchell and Company insurance agents market the products on the premises of the Barnett branch banks contributes to the deceptive and misleading nature of the program. The personal and telephonic solicitations of customers by James Mitchell and Company insurance agents and through actions of Barnett Bank employees, contemplated by the services agreement, contribute to the deceptive and misleading nature of the program.

The Hearing Officer's findings are exactly what Barnett is asserting is an implausible rationale for 626.988. The Barnett/Mitchell arrangement was a conscious effort to obscure the distinction between Barnett's banking activities and insurance products sold on bank premises. The result was consumers being deceived and misled as to the fact they were buying an insurance company product and not a bank product, and that individuals on Barnett premises who appeared to be bank employees were actually insurance agents. Barnett customers were

being channeled into insurance transactions by Barnett employees without understanding that the insurance product called a "Tax Advantage Account" was not part of Barnett's bank services.

The Department of Insurance in a Final Order issued July 7, 1995, accepted the Hearing Officer's recommended penalties and revoked the Florida nonresident life insurance agent's license issued to James K. Mitchell, ordered James K. Mitchell and Company, and James K. Mitchell, as an officer and director of James K. Mitchell and Company, to cease and desist the prohibited practices described in the Recommended Order, and ordered James K. Mitchell and Company to obtain an insurance agency license. The Department of Insurance additionally concluded in its Final Order that the Mitchell/Barnett arrangement was an illegal association with regard to insurance sales between an insurance agent and bank pursuant to 626.988. The Department's Final Order is currently on appeal before the Florida First District Court of Appeal.[4]

The holding of the District Court below was indeed prophetic with regard to the Hearing Officer's conclusions in the *Mitchell* case eight months later. The District Court held:

> Additionally, and notwithstanding the existence of specific prohibitions on coercive credit extension, the Court finds that loan officers could steer customers to the bank's insurance agent for the purpose of suggesting the sale of insurance that is not needed, in order for the bank to make a profit on the insurance policy. The concern herein expressed is that an arms-length

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[4] Eighteen copies of the Hearing Officer's Recommended Order and Department Final Order in *Department of Insurance and Treasurer v. James Mitchell and Company, et al.* have been lodged with the Supreme Court Clerk's Office. These documents are official public records of the State of Florida.

> relationship be maintained among the bank, the loan officer and the insurance agents. The maintenance of this relationship is for the protection of the solvency of the insurance industry, and the prevention of coercion, which in turn protects all potential, present and future policyholders.

Barnett, 839 F.Supp. at 842, Pet. App. 31a.

The Circuit Court below put an even finer point on this issue by holding:

> While Appellant Barnett Marion argues that the statute exists only to protect "independent insurance agents from competition by financial institutions," Appellants Brief at 35, we disagree. The danger in these situations, as the trial court correctly points out, is the loss of arms-length transactions and objectivity when the bank becomes involved with insurer and insured.

Barnett, 43 F.3d at 636, Pet. App. 12a.

D. The Established Purpose Of 626.988 Meets The First Prong Of The *Fabe* Test.

Once the purpose of 626.988, as expressed by Florida's Legislature, state regulator, and courts, is established, the next analysis is how the expressed purpose fits the federal definition of regulating "the business of insurance." In *Fabe*, *supra*, this Court explained the issue by holding:

> The broad category of laws enacted "for the purpose of regulating the business of insurance" consists of laws that possess the "end, intention or aim" of *adjusting, managing, or controlling* the business of insurance. Black's Law Dictionary 1236, 1286 (6th ed. 1990). This category necessarily encompasses more than just the "business of insurance." For the reasons expressed above, we believe that the actual performance of an insurance contract is an essential part of the "business of insurance."

113 S.Ct. at 2210 (emphasis added).

The District Court, applying the *Fabe* test, characterized 626.988 as appearing to:

> define or regulate a relationship between insurer and *potential* policyholder, that is, the insurance-purchasing public at large, rather than one between insurer and *present* policyholder.

839 F.Supp. at 840., Pet. App. 28a. The distinction between "potential" and "present" policyholders utilized by the District Court is pointed to by Barnett as a flaw in the reasoning of the lower courts. However, Barnett's argument reveals a lack of practical understanding of the business of insurance and its regulation.

The point-of-sale transaction, when the insurance is solicited and sold, is an essential part of the business of insurance. Every person who purchases insurance is a "potential" policyholder until an actual insurance policy is issued. What occurs during the solicitation and sale of the policy — what the consumer represents to the agent and what the agent represents to the consumer — influences the very existence and enforceability of an insurance contract. The consumer is still a "potential" policyholder when solicitation materials are provided, when coverage choices are made, and even when the vitally important application for coverage is filled out. In terms of regulating abuses such as unfair trade practices and coercion, the focus of regulatory efforts is protecting "potential" policyholders. Moreover, "potential" policyholders become "present" policyholders generally with no personal contact with the insurer whatsoever. The insurance agent is the living link between the policyholder and the insurance company. "Insurance is a business greatly affected by the public trust, and the holder of an

agent's license stands in a fiduciary relationship to both the client and insurance company." *Natelson v. Department of Insurance*, 454 So.2d 31, 32 (Fla. 1st DCA 1984). In sum, the relationship between insurer and policyholder revolves around the axis of the role of the insurance agent.

The District Court proceeded to cite the *National Securities* holding that statutes aimed at protecting the relationship between insurer and insured, "directly or indirectly," are statutes enacted for the purpose of regulating the business of insurance. The Court then concluded:

> Future policyholders then are "indirectly" affected by regulations such as section 626.988. Thus, the Court finds that Florida section 626.988 indirectly protects the relationship between insurer and insured because it is aimed at protecting the insurance purchasing public at large.

Barnett, 839 F.Supp. at 841.

The Court uses the term "indirect" to connote that laws which regulate the point-of-sale transaction involve persons who are not yet "insureds." In this sense, as already indicated, many important insurance consumer protection laws "indirectly" affect the relationship between insurer and policyholder.[5] Therefore, the important consideration is not the directness of the protection, but its role in protecting the public. The public can be much better protected by regulating against abuses at the point of sale rather than after "the horse is out of the barn" when a policy has been issued and a "direct" relationship exists.

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[5] E.g., misrepresentations and false advertising, defamation, boycott, coercion, intimidation, false statements, unfair discrimination, unlawful rebate, twisting, misrepresentation in insurance applications, refusal to insure, prohibited arrangements as to funerals and funeral directors, and sliding. Fla. Stat. Ann. §626.9541(1) (a), (b), (c), (d), (g), (h), (k), (l), (s), (x), (z).

The Circuit Court below summarized its reasoning for concluding 626.988 regulates the business of insurance as follows:

> Relying on the state court interpretations, testimony at trial, reference in the Florida statute to McCarran-Ferguson, and explicit instruction from the United States Supreme Court in *Nat'l Securities* that regulatory protection of policyholders may be indirect . . . 626.988 regulates the business of insurance because it protects policyholders.

Barnett, 43 F.3d at 636.

This reasoning goes right to the heart of the reality that the purpose of 626.988, which was accepted by both the District Court and Circuit Court, is to protect policyholders. Thus, 626.988 is "truly a form of regulation" of the business of insurance. The regulation takes place at the point of sale and "controls" and "manages" the potential for coercion, unfair trade practices, or undue concentration of resources by removing the potential for abuse perceived by the Legislature.

The Solicitor General's brief supporting Barnett makes an important concession at page 12:

> We do not dispute that "[t]he selling . . . of policies . . . and the licensing of . . . agents" can be part of the "business of insurance." See *National Securities*, 393 U.S. at 460. Many state sales and licensing regulations may indeed be "enacted . . . for the purpose of regulating" that business within the meaning of 15 U.S.C. 1012(b).

Sol. Gen. Br. p. 12.

However, the Solicitor General still asserts 626.988 is not such a law because an inquiry into the practical, realistic, actual purpose of 626.988 is not "protecting or regulating, even indirectly, the relationship between the insurance company and its policyholders." The Department would respectfully submit that the practical, real-

istic, and actual purpose of 626.988 has been overwhelmingly demonstrated to be the protection of policyholders. It is the Petitioner and its Amici who ask this court to disregard the record and adopt an extremely cynical view of Florida's support of 626.988.

No state or federal court has permitted the established and worthwhile goals underlying 626.988, which operate to protect Florida consumers, to be mischaracterized as merely a conflict between banks and insurance agents. Neither should this Court.

E. The District Court And Circuit Court Recognized The legitimate Peril Of Undue Concentration Of Resources.

One of the stated purposes of 626.988 is the prevention of "undue concentration of resources."[6] As used in the context of 626.988, the phrase "undue concentration of resources" refers to the situation where a third party marketer provides such a substantial source of income to an insurer that the third party controls, in effect, the decision-making of the insurer. This situation was credibly established by uncontroverted testimony at trial.[7] This practice thus "indirectly" harms Florida consumers.

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[6] *Glendale*, n. 1.

[7] Trial transcript page 25, lines 7-19: "Q: You indicated that another purpose of 626.988 is to prevent concentration of economic resources through control of insurance companies by financial institutions. Can you explain how the statute works in that regard? A: Yes. What we have seen is agents and other third parties who have access to a large customer base of potential insurance consumers have the potential through — by virtue of the cash flow and the premium writings that can be generated by that block of business, of controlling the decision making process of the insurers which would provide insurance to that group, to the extent that they have caused the insolvency of insurance companies in Florida and other states."

Trial transcript, pages 25-26: "...once the insurance company becomes dependent on the cash flow the marketers can begin to siphon off funds for

Both the District Court and Circuit Court placed great emphasis on the issue of avoiding threats to insurer solvency in examining Section 626.988. The District Court, in reliance on the testimony of Department witness Shropshire, held:

> The Court concurs with the concerns noted by the witness. For example, in order to make a profit on automobile loans or home mortgages, the insurance agents may incur business they might otherwise reject because they would be pressured by the bank to do so in order to consummate the bank's loan transactions. This might lead to the over insurance of risky business, which could result in the insolvency of the insurer.

Barnett, 839 F.Supp. at 842.

The Circuit Court recognized the significance of Mr. Shropshire's testimony, finding:

> At trial ... Mr. Shropshire testified about the need to protect policyholders by regulating the financial stability of insurance companies so that they remain solvent and able to pay claims upon demand, which could be threatened by pressures to make improper insurance decisions. This pressure could force an insurer to assume a bad risk to quickly consummate a

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administrative expenses or reinsurance agreements with insurers that they are otherwise affiliated with, and...those administrative fees and consulting fees...drive the decisions with respect to the effectuation of coverage."

"If they [the third party marketer] control the insurer they can, therefore, effectuate a situation where they're focused on getting their income from the sale of the insurance that may not always be in the best interest [of the insurer].... They may lower underwriting standards in order to attract more insureds. The long run of that is that it could impact the solvency of the insurance company when those underwriting standards are not enforced and bad risks are put on the book and the insurance company incurred a bunch of claims."

> bank loan, or could push a bank customer to take out unnecessary insurance where the bank's only motive is profit.

Barnett, 43 F.3d at 636. This point is so critical that elaboration of this potential for harm is appropriate.

Section 626.988 is only one of several statutory provisions where the Florida legislature has addressed the danger of de facto control of insurers by third parties. As testified at trial,[8] the Florida legislature has addressed the same danger in several other contexts, including:

(1) holding companies, Fla. Stat. Ann. § 628.801;

(2) managing general agents, Fla. Stat. Ann. § 626.7451;

(3) third party administrators, Fla. Stat. Ann. § 626.88;

(4) producer-controlled business, Fla. Stat. Ann. § 626.7491;

(5) favored-agent, Fla. Stat. Ann. § 626.730(3).

The Department presented testimony at trial as to the similarities between the dangers addressed in 626.988 from "undue concentration of resources," and the same type of dangers addressed in other statutes. The motivation to push poor quality business on an insurer is present in each circumstance addressed in the above-cited statutes. Most individual insurance agents are compensated through a system of sales-based commissions, and so some will act upon the same motivation. The difference is that an individual agent, or even an independent

[8] Trial Transcript, page 27-28. "Q: Okay. Mr. Dowdell, are there other statutes within the [Florida Insurance] Code in addition to 626.988, which were enacted for the purpose of regulating the potential for control of insurers by insurance marketers? A: Yes. There are a number of statutes which have been enacted for that purpose. There is a producer controlled insurer statute...a managing general agent law...a holding company statute...a third party administrator statute...."

small town bank, does not have sufficient leverage to compel insurer management to do something management knows would be adverse to the insurer's solvency. This is not true when an insurer becomes so dependent on a large bank holding company for its dominant income production that the insurance company management cannot afford to make objective decisions. An insurer's management decisions could certainly be adversely influenced by Barnett, with its 600 Florida branches (Lodging, Tab C. p. 9) and enormous potential income stream.

Other commentators have recognized the very real danger to insurer solvency that results when third parties obtain de facto control of an insurer's decision making[9] with the attendant inability of the insurer to pay claims of policyholders.

Moreover, a Report of the U.S. House of Representatives closely echoes the testimony of the Department's witnesses below, and reveals that the Florida Legislature's concerns, are neither illusory nor hypothetical. This Congressional report is entitled Failed Promises — Insurance Company Insolvencies — A Report by the Subcommittee on Oversight and Investigations of the Committee On Energy and Commerce, U.S. House of Representatives, 101st Cong., 2d Sess. (1990). (The Subcommittee was chaired by Rep. John Dingell, and the February 1990 Report is sometimes referred to as the "Dingell Report.") The first two of a list of six "key weaknesses in the present system

[9] The insolvency of the Baldwin-United insurance company, one of the largest insurer insolvencies ever to occur in the United States, is attributed by commentators to outside control of the insurer by affiliated parties that did not have the insurer's best interest at heart. *See*, e.g., Dunne, *Intercompany Transactions Within Insurance Holding Companies*, 20 The ABA Forum 445, 446 (1985): "The bottom line question for insurance regulators is: Can our present laws assure the preservation of the money people have entrusted to insurers that operate within holding company systems to cover risks they are committed to insure? In other words, can the laws keep insurers from getting milked to impotence..."

of solvency regulation,"[10] identified in the Subcommittee Report, directly address the danger of outside influence and control of an insurer by third parties. The Report notes that "through excessive reliance on the judgements of managing general agents, brokers, and other companies, many insurance company managers essentially delegate their most fundamental responsibilities to third parties who may have conflicting interests or inadequate abilities."[11] The Subcommittee termed the problems posed by managing general agents, as third parties who can come to control an insurer, as "exceedingly dangerous."[12] Managing general agents are, in essence, "super agents" who control the marketing efforts of an insurer. This arrangement is very similar to the sort of arrangements likely to occur between bank holding companies and insurers. Moreover, contrary to Barnett's assertion, financial institutions could exert undue influence on insurance company decisions without necessarily meeting the definition of a Managing General Agent or other licensed marketer and thus a specific prohibition is required.

While failing to acknowledge that Section 626.988 addresses the same concern, Barnett, at footnote 2, page 28 of its brief, concedes Florida laws regarding third party administrators and managing general agents protect the solvency of insurers stating:

> There is no dispute that these laws of general application were intended to protect the solvency of insurance companies by limiting the opportunity for powerful third parties to influence underwriting decisions.

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10 Subcommittee Report, page 3.

11 Subcommittee Report at 3.

12 Subcommittee Report at 10.

Although more precise in its focus, Section 626.988 deals with a far more powerful third party than managing general agents or third party administrators, and the potential for influencing underwriting decisions is correspondingly greater.

II. The Federal Reserve Act, Including Section 92, Specifically Relates To The Business Of Banking.

Barnett argues in its brief at page 41 that even if Section 626.988 clears the first hurdle of the McCarran-Ferguson test and regulates the business of insurance, this Florida law must clear a second hurdle, that Section 92 does not specifically relate to the business of insurance. Barnett describes this second hurdle as "virtually insurmountable." Barnett's argument makes a subtle, but inappropriate modification of the actual McCarran-Ferguson test.

When McCarran-Ferguson is properly applied, and Section 626.988 clears the hurdle of the first part of the McCarran-Ferguson test, it is Section 92 which then must be tested and clear the hurdle of "specifically relating to the business of insurance." Barnett's argument seeks to obscure the fact that there has been a shifting of the burden of preemption (the concept of reverse-preemption). Barnett must now prove that Section 92 passes muster as a federal law which overcomes the state insurance regulatory law. By suggesting the Florida law must clear both the McCarran-Ferguson test hurdles, Barnett manufactures the argument that:

> [I]f a prohibition on banks selling insurance regulates the "business of insurance," section 92's express authorization of bank insurance sales must at least specifically relate to the insurance business.

Barnett Br. p. 41. This argument is flawed because it attempts to answer the second test simply by looking at the answer to the first test. Contrary to this flawed logic, this Court must scrutinize Section 92 on its own merits to determine whether Section 92 was enacted to "specifically relate to the business of insurance." This

analysis is independent of that applied in the first test to the state law.

A. The Second Part Of The Mccarran-Ferguson Test Must Be Applied In A Manner Which Gives Substance To McCarran-Ferguson's Protection Of Regulation Of The Business Of Insurance By The States.

In determining whether Section 92 "specifically relates" to the business of insurance, the weight given to the preemptive effect of McCarran-Ferguson has great bearing on the outcome reached. The reasoning of the District Court and Circuit Court below, and of the *Owensboro* courts, reflects a strong recognition of the reverse-preemptive power of McCarran-Ferguson. This perspective was well expressed by the Circuit Court below as follows:

> With McCarran-Ferguson guiding our analysis, this Court must ask whether Fla.Stat. ch. 626.988 *regulates* insurance, so as to presumptively preempt contrary federal law. Second, we must ask whether section 92 *specifically relates* to insurance, so that it will fit within the McCarran-Ferguson exception that reinstates federal law as supreme.

Barnett, 43 F.3d at 634.

The McCarran-Ferguson tests thus proceed as follows: A state law which passes the first test preempts the federal law. The federal law can only be "reinstated" by passing the second test.

The cases considering whether Section 92 "specifically relates" to the business of insurance have two common points in their reasoning. First, under McCarran-Ferguson, a federal enactment "specifically relates" only to its primary subject. A provision cannot specifically relate to two things at once. That is, is the primary subject of Section 92 banking or the business

of insurance? Second, the Courts analyze whether the federal law "specifically relates" to the business of insurance with enough substance to reinstate the federal law over the state law. In other words, the federal law must "specifically relate" with enough preemptive horsepower to displace the state law. This perspective is expressed in the District Court's reasoning that:

> . . . section 92 simply fails to manifest any express intent to preempt state insurance laws. That silence is particularly understandable given the historical *fact* that section 92 was enacted "at a time when the business of insurance was believed to be beyond the reach of Congress' power under the Commerce Clause."

Barnett, 839 F.Supp. at 843.

The perspective and reasoning of the lower courts in applying McCarran-Ferguson give substance to Congress' intent for regulation of the business of insurance to lie primarily with the states. Through the "clear statement rule," state laws enjoy the protection necessary to maintain the integrity of the state insurance regulatory system.

However, Barnett and its Amici approach the issue from an entirely different perspective. They view McCarran-Ferguson as a mere "bump in the road" of federal law supremacy, with any connection to the business of insurance being sufficient to move the federal law past the McCarran-Ferguson obstacle. For example, the Solicitor General, at page 20 of its brief concedes:

> We may certainly assume that in authorizing national banks in small towns to sell insurance, Congress' primary purpose was to regulate banking.

Yet, the Solicitor General proceeds to assert Section 92 "specifically relates to the business of insurance by permitting some banks to engage in one aspect of that business." (Solicitor General's Br. at 21.) This reasoning is understandable from individuals accustomed to the supremacy of federal laws under the National Banking Act.

However, any attempt to preempt state regulation of insurance requires a different preemption analysis under McCarran-Ferguson.

B. The Courts Which Have Addressed The Issue Agree: section 92 Is Not An "Act Specifically Relate[d] To The Business Of Insurance."

In determining whether Section 92 "specifically relates to the business of insurance," it is very instructive how the District and Circuit Courts below and the *Owensboro* courts have addressed the issue.

1. The *Owensboro* District Court

The *Owensboro* District Court conducted its McCarran-Ferguson analysis "in reverse order" and determined first whether 12 U.S.C. § 92 is an Act of Congress which relates to the business of insurance. The Court concluded:

> The "business of insurance" has been narrowly defined, and it seems fairly obvious that § 92 does not constitute Congressional regulation of that business. This section is a part of the National Bank Act, and its function is to grant additional powers to national banks. That the power granted to the national banks involves insurance does not transform this section into a regulation of the business of insurance. Accordingly, § 92 will not invalidate the Kentucky statute on these grounds.

Owensboro Nat'l Bank v. Moore, 803 F.Supp. 24, 36 (E.D.Ky. 1992). The *Owensboro* District Court looked at the *function* of Section 92 — to grant additional powers to national banks — and properly concluded that the fact that this grant of power involved insurance did not transform Section 92 into regulation of the business of insurance.

2. The *Owensboro* Circuit Court

On appeal, the *Owensboro* Circuit Court majority stated, "we need not consider whether Section 92 'specifically relates to the business of insurance'; for without regard to whether Section 92 so relates, McCarran-Ferguson cannot save Section "287 from preemption." *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388, 392 (6th Cir. 1994). Thus, the *Owensboro* majority took no position on whether Section 92 "specifically relates to the business of insurance."

Judge Batchelder, in a dissenting opinion (Pet. App. 50a-64a), did address whether Section 92 specifically relates to the business of insurance. Her position squared with the *Owensboro* District Court that Section 92 is not an Act specifically related to the business of insurance. (Pet. App. 61a *et seq.)* Citing Section 92's legislative history, she found the District Court's *Owensboro* analysis "sound" because the primary intent of Section 92 was to strengthen small national banks by providing them with additional sources of revenue *Owensboro,* 44 F.3d at 397-398.

3. The *Barnett* District Court

The District Court addressed the issue of Section 92 "specifically relat[ing] to the business of insurance" at footnote 3 of its opinion:

> In the alternative, Plaintiff [Barnett] could prevail under a McCarran-Ferguson analysis if the Court found that section 92 was specifically related to the business of insurance, and if 626.988 is deemed to be a law enacted for the purpose of regulating insurance. However, Plaintiff has consistently stated and/or conceded that section 92 is a "bank" law, and has premised its argument accordingly.

Barnett, 839 F.Supp. at 839, Pet. App. 25a. The Court's observation that Barnett had stated and/or conceded Section 92 is a "bank" law is supported by the following trial excerpt:

> The Court: And your belief is that Section 92 is a banking statute?
>
> Mr. Wells: I believe that Section 92 is in the National Bank Act and provides that a national bank can engage in certain insurance agency activities.
>
> The Court: So would you classify it as a banking statute or an insurance statute or a combination thereof?
>
> Mr. Wells: I would classify it as a banking statute.

TR-108. Barnett made the same concession in its pleadings, stating:

> This issue was also squarely addressed in *Owensboro*. There, the court recognized that a national bank engaged in insurance agency activities pursuant to Section 92 is not engaged in the business of insurance, it is engaged in the business of banking: "that the power granted to the national banks involves insurance does not transform this section [92] into a regulation of the business of insurance." *Owensboro*, 803 F.Supp. at 36.

R. 2-28, p.21.

4. The *Barnett* Circuit Court

The Circuit Court below began its analysis of this issue by tracing the history of Section 92, which it took in "compacted form" from *United States Nat'l Bank of Or. v. Independent Ins. Agents,* ___U.S. ___, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993). *Barnett,* 43 F.3d at 637, n. 2; (Pet. App. 13a-14a). The Circuit Court, relying on this Court's decision in *Fabe*, stated:

> Although *Nat'l Bank of Or.* did not address whether section 92 relates to insurance, it did emphasize at length the relation between section 92 and both the National Bank Act and the Federal Reserve Act, neither of which suggests section 92 relates specifically to insurance or was a specific attempt to preempt state insurance laws. Both Acts concern banking, not insurance. Moreover, Congress enacted section 92 "at a time when the business of insurance was believed to be beyond the reach of Congress' power under the Commerce Clause." *Fabe*, __ U.S. at __ , 113 S.Ct. at 2212. As the trial court pointed out, "[e]ven *South-Eastern Underwriters*, which briefly altered the preemption landscape, noted that prior to 1944 Congress 'at no time' had attempted to control the business of insurance." [citations omitted] Before 1944, both Congress and the Supreme Court understood *Paul v. Virginia* [citation omitted] to place insurance outside the Commerce Clause power. Accordingly, when Congress enacted section 92 in 1916 — nearly 30 years before *South-Eastern Underwriters* — Congress could not have been attempting to regulate a business that it believed it had no power to regulate. Congress was concerned with banking, not insurance.
>
> This Court concludes that section 92 neither "specifically relates to the business of insurance," 15 U.S.C. § 1012(b), nor "specifically requires," *Fabe*, __ U.S. at __ , 113 S.Ct. at 2211, that apparently conflicting state laws be preempted.

Barnett, 43 F.3d at 637.

The pertinent decisions reveal that there is no conflict among the federal circuits on the issue of whether Section 92 "specifically relates to the business of insurance." To the contrary, each Court which has considered the question has dis-

posed of this issue in the negative with relative ease. (See also Louisiana state court decision: *First Advantage Ins., Inc. v. Green*, 652 So.2d 562 (La. Ct. App.), *writ. denied*, 654 So.2d 331 (La. 1995).)

C. The Court Should Examine The 1916 Act As A Whole To Determine Whether Section 92 Specifically Relates To The Business Of Insurance.

The McCarran-Ferguson Act provides that no "*Act*" of Congress shall impair state law enacted for the purpose of regulating the business of insurance unless the Act specifically relates to the business of insurance. Therefore, in determining whether the exception to McCarran's reverse preemption applies to Section 92, examination of the 1916 Act as a whole is instructive. (See Judge Schlesinger's remarks at Transcript of Motions Hearing, 41-42.)

Section 92 was enacted in 1916 as a part of a comprehensive amendment of the Federal Reserve Act of 1913.[13] The 1916 legislation is entitled "An Act to Amend Certain Sections of the Act Entitled 'Federal Reserve Act.'" The 1916 Act (Lodging, Tab A) amended numerous sections of the 1913 Federal Reserve Act in a variety of ways distinctively relating to banking, including: permitting member banks to maintain reserves in their own vaults; increasing the amounts of certain instruments a bank could receive if secured by collateral; permitting any Federal reserve bank to make advances to member banks for a period not exceeding fifteen days; permitting member banks to accept certain instruments for the purpose of furnishing dollar exchange; authorizing member banks to open and maintain bank accounts for foreign correspondents; permitting banks to make loans secured by farm land and real estate situated within 100

[13] A copy of the 1916 Amendment to the 1913 Federal Reserve Act is included in the Department's Lodging with the Supreme Court Clerk.

miles of the bank's location; and authorizing national banking associations with capital and surplus of $1 million or more to invest in the stock of banks engaged in international and foreign banking. One provision of the 1916 Act, now codified as 12 U.S.C. 92, permitted national banks located in a place of 5,000 or less population to act as insurance agents.

However, Section 92 is not an "Act." It constitutes only a small part of chapter 461, "An Act To amend certain sections of the Act entitled 'Federal reserve Act,' ...." H.R. 13391, 64th Cong., 1st Sess. Ch. 461 (1916). The 1916 amendment to the Federal Reserve Act, taken in its entirety, cannot be said to "specifically relate" to the business of insurance. As noted by this Court in *U.S. Nat'l Bank of Or.*, "Section 92 travels together with the paragraphs that surround it." 113 S.Ct. at 2185.

D. Section 92 Does Not Meet The McCarran-Ferguson "Clear Statement Rule".

Even assuming arguendo that Section 92 is an "Act," Section 92 still does not "specifically relate" to the business of insurance within McCarran-Ferguson's "clear statement rule," as described in *Fabe*, *supra*, as follows:

> The McCarran-Ferguson Act did not simply overrule *South-Eastern Underwriters* and restore the status quo. To the contrary, it transformed the legal landscape by overturning the normal rules of pre-emption. Ordinarily, a federal law supersedes any inconsistent state law. *The first clause of § 2(b) reverses this by imposing what is, in effect, a clear-statement rule, a rule that state laws enacted "for the purpose of regulating the business of insurance" do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise.*

113 S.Ct. at 2211 (emphasis added).

The "clear statement rule" arises in part as a result of the strong presumption against imputing to Congress an intent to preempt state regulation in an area which has been traditionally left to the states. *Jones v. Rath Packing Co.*, *supra*, 430 U.S. at 525. The *Fabe* Court's recognition of this rule also arises from the legislative history statements "animating" the first clause of 15 U.S.C. § 1012(b):

> Elaborating upon the purpose animating the first clause of § 2(b) of the McCarran-Ferguson Act, Senator Ferguson observed:
>
> "What we have in mind is that the insurance business, being interstate commerce, if we merely enact a law *relating* to interstate commerce, or *if there is a law now on the statute books relating in some way to interstate commerce, it would not apply to insurance*. We wanted to be sure that the Congress, in its wisdom, would *act specifically with reference to insurance* in enacting the law." 91 Cong Rec 1487 (1945). This passage later confirms that "*no existing law* and no future law should, *by mere implication, be applied to the business of insurance*" (statement of Mr.
> Mahoney). *Ibid.*

Fabe, 113 S.Ct. at 2211, n. 7 (emphasis added).

These excerpts from the legislative history of the McCarran-Ferguson Act reflect that Congress intended to avoid any inadvertent preemption of state insurance law by federal law. It is not enough for a federal act to involve the business of insurance. Something more was envisioned. In the words of Senator Ferguson, Congress must act "specifically" with reference to insurance.

When used as an adjective, "specific" is defined as "constituting or falling into a specified category" or "restricted by

nature to a particular individual, situation, relation, or effect." *Webster's New Collegiate Dictionary* (1981). A given law cannot "specifically relate" to two different subjects. Section 92 is but one of a variety of provisions contained in the 1916 Act amending the Federal Reserve Act which confers additional authority to national banks. Section 92 only relates to the business of banking, not the business of insurance.

When used as a noun, "specific" means "details" or "particulars." *Id.* In this context, Section 92 must therefore deal with the business of insurance in a detailed manner in order to qualify as an exception under the McCarran-Ferguson Act. The 1916 Act contains a variety of detailed provisions relating to the intricacies of numerous banking activities. Section 92, by contrast, does not describe insurance-related activities in any detail whatsoever. The fact that the word "insurance" is mentioned several times in Section 92 does not transform the statute into an act which specifically relates to the business of insurance.

Further, in addition to authorizing insurance sales, Section 92 also authorizes a national bank to act as a broker for real estate loans and to receive fees and commissions in that regard. The common element of the two activities is the receipt of commissions. Section 92 therefore specifically relates to bank income, not the business of insurance.

The version of the McCarran-Ferguson Act which was passed by both the House of Representatives and the Senate read:

> No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, *unless such act specifically so provides*.

91 Cong. Rec. 329-30 (1945), 91 Cong. Rec. 478-88 (1945) (emphasis added).

The McCarran-Ferguson Act was amended in Conference Committee to exempt a Federal act which "specifically relates to the business of insurance." Barnett asserts that the Conference Committee "jettisoned the narrow savings clause in favor of an expansive clause that validates any federal statute that 'specifically relates to the business of insurance.'" However, the Conference Committee Report (Lodging, Tab B) states it was the purpose of the agreement between the House and Senate to state in as clear language as possible that a moratorium be granted to the insurance business from the operation of antitrust laws, "leaving the taxing and regulatory powers of the several States fully protected."[14] This statement makes it clear the language change was not intended to dilute protection of state regulation.

E. In Enacting Section 92, Congress Never Intended To Permit The Comptroller To Unilaterally Supplant Established State Insurance Regulatory Schemes.

There can be little doubt that in 1916, Congress had no intention of placing the Comptroller of the Currency in the position of regulating the business of insurance. Any authority granted to the Comptroller is based on the Comptroller's authority over the business of banking, not the business of insurance. Regulation of the business of insurance is entirely outside the Comptroller's area of jurisdiction and expertise. To conclude that Section 92 specifically relates to the business of insurance would produce the absurd result of the Comptroller of the Currency regulating the business of insurance.

Congress' purpose in enacting Section 92 was to allow a limited group of small national banks to pursue another revenue source. Prior to Section 92's enactment, national banks had no

[14] A copy of the Conference Committee Report is included in the Department's Lodging with the Supreme Court Clerk.

authority to sell insurance *even in the absence of state law prohibiting such sales*. Thus, Section 92 has been properly construed to merely permit (as opposed to mandate) national banks to sell insurance in towns of under 5,000 population, only if a state law does not prohibit such activity. However, in Florida, state law does prohibit such activity for valid reasons unique to Florida. There is no indication whatsoever that Section 92 was intended to remove any power held by the states.

F. Cases Cited By Barnett Construing "Specifically Relates To Insurance" Are Distinguishable.

Barnett's position is not strengthened by reference to cases involving the Employee Retirement Income Security Act (ERISA). 29 U.S.C. § 1001, *et seq*. ERISA comprehensively regulates insured and self-insured health and life insurance plans offered by employers to employees. "ERISA, both in general and in the guaranteed benefit policy provision in particular, obviously and specifically relates to the business of insurance." *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, __ U.S. __, 114 S.Ct. 517, 525, 126 L.Ed.2d 524 (1993). In contrast, Section 92 does not comprehensively regulate the business of insurance.

Further, ERISA's "deemer" clause clearly evidences an intent to exempt employee benefit plans from the preemption language of McCarran-Ferguson. In this regard, 29 U.S.C. 1144(b)(2)(B) expressly provides that no employee benefit plan "shall be deemed to be an insurance company . . . or to be engaged in the business of insurance . . . for purposes of any law of any state purporting to regulate insurance companies." Whereas several courts have found ERISA to specifically relate to insurance, none have found Section 92 to relate to anything other than banking.

The decisions in *Hanover Ins. Co. v. Commissioner*, 598 F.2d 1211 (1st Cir.), *cert. denied*, 444 U.S. 915 (1979), and *Texas Employers' Ins. Ass'n v. Jackson*, 820 F.2d 1406 (5th Cir.

1987), *cert. denied*, 490 U.S. 1035 (1989), relied on by Barnett, are likewise not persuasive. The *Hanover* Court reviewed an Internal Revenue Service statute dealing exclusively with the taxation of insurance companies. The federal statute (26 U.S.C. § 832) allowed an insurer to deduct incurred but unpaid losses from taxable income but required the estimate of such losses to be reasonable. The Court concluded there was no demonstration that the Code provision in any way impaired state insurance regulation indicating:

> "Because the power of the federal government to tax was not delegated to the states" by the Act ... [citation omitted] the application of federal laws to insurance companies is not inconsistent with the intent of Congress to refrain from interfering with state regulation of the insurance business.

Hanover, 598 F.2d at 1218. Further, unlike Section 92, the Internal Revenue Code provision considered in that case is part of a pervasive regulatory scheme in which Congress has indicated an intent to occupy the field. (Sections 801 to 843 of Subchapter L of Chapter 1 of the Internal Revenue Code)

Similarly, the *Texas Employers'* Court addressed the Longshore and Harbor Workers Compensation Act. 33 U.S.C. § 901, *et seq*. Unlike Section 92, the Federal worker's compensation act expressly provides that an employer's liability under the Act is "exclusive and in place of all other liability." 33 U.S.C. § 905. Further, the Act is a comprehensive scheme addressing worker's compensation benefits provided by employers through insured and self-insured programs. Section 935 of the Act subjects insurers to all of the requirements and obligations applicable to employers, and expressly indicates that such a requirement facilitated the administration of the entire regulatory scheme. Again, unlike Section 92, the intent of the Act to preempt may be inferred from the creation of a pervasive federal regulatory system.

Finally, *Wisner v. Wisner*, 338 U.S. 655 (1950), cited by Barnett, is irrelevant. The case dealt with a conflict between the National Service Life Insurance Company Act of 1940 and a state's community property law. No state law enacted for the purpose of regulating the business of insurance was involved and the case has no bearing on the interpretation of the McCarran-Ferguson Act.

III. Under Traditional Preemption Doctrine, Petitioner Cannot Overcome The Strong Presumption That Congress Did Not Intend To Oust State Regulation Of The Conduct Of Insurance By Preempting Section 626.988.

The Eleventh Circuit did not reach the question whether Section 92 preempts Section 626.988 under a traditional preemption analysis because it concluded that the McCarran-Ferguson Act's "reverse-preemption" rule precludes an interpretation of Section 92 as superseding state law. Nevertheless, even under traditional preemption doctrine, Section 626.988 is fully applicable to Barnett, regardless of its national bank charter.

Petitioner cannot overcome the strong presumption that Congress did not intend to displace the States' traditional role in regulating the conduct of insurance within their borders. *See N.Y. Conf. of Blue Cross v. Travelers Ins.*, __ U.S. __, 115 S.Ct. 1671, 1676 (1995). There is no "clear and manifest" evidence, *id*., that Congress intended to convey an indefeasible right on small-town national banks to sell insurance even where state insurance law would limit or preclude that activity, especially where, as here, the state law is evenly applied to both state-chartered and federally chartered banks. Section 92's legislative history demonstrates that it was designed to enable small-town national banks to obtain additional fee income in order to better compete with state-chartered banks that were permitted to engage in these nonbanking activities. *See* 53 Cong. Rec. 11001 (1916); Barnett Br. at 3. There is no evidence Congress believed that this authority was critical to the banking functions of

national banks, and there is no evidence that it serves such a purpose. In enacting Section 92, Congress did no more than grant small-town national banks the charter capacity to engage in a business that was universally understood to be controlled exclusively by the states. Section 626.988, which has the effect of precluding *all* bank subsidiaries of bank holding companies from selling non-credit insurance, does not create an "obstacle" to the accomplishment of Congress' goals. *See Hillsborough County, Fla. v. Automated Medical Labs., Inc.*, 471 U.S. 707, 713 (1975).

To avoid repetition and preserve space, the Department will not reiterate the traditional preemption arguments more fully set out in the Brief of the Florida Association of Life Underwriters, et al., and fully adopts those arguments.

CONCLUSION

The judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

DAVID J. BUSCH
Counsel of Record

DANIEL Y. SUMNER
General Counsel
DENNIS SILVERMAN
KAREN ASHER-COHEN
FLORIDA DEPARTMENT
OF INSURANCE
200 E. Gaines Street
Tallahassee, FL 32399-0333
(904) 413-4146

Attorneys for Respondents
Bill Nelson and the Florida
Department of Insurance

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